Laborers' Eastern Region Organizing Fund *and* The Ranches at Mt. Sinai

Laborers' Eastern Region Organizing Fund *and* Concrete Structures, Inc. Cases 29–CC–1422 and 22–CP–662

April 28, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On June 14, 2005, Administrative Law Judge Steven Davis issued the attached decision. Laborers' Eastern Region Organizing Fund (Respondent) filed exceptions, a supporting brief, and an answering brief to General Counsel's limited exceptions. The Ranches at Mt. Sinai (The Ranches) filed exceptions, and Concrete Structures, Inc. (CSI) filed limited exceptions and a supporting brief. The General Counsel filed a brief in support of the judge's decision and a limited exception.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, except as modified herein, and to adopt the recommended Order. For the reasons set forth below, we find it unnecessary to pass on the judge's finding that the Respondent's use of an inflated rat constitutes signal picketing. Instead, we base our conclusions solely on other evidence of unlawful picketing activity.

I. FACTS

As more fully set forth in the judge's decision, CSI pours concrete for building foundations and curbs, employing approximately 30 workers. The Respondent does not deny that throughout 2002 it made monthly demands for recognition to CSI's president, Americo Magalhaes, who refused the Respondent's demands.

In July 2002,[2] the Respondent engaged in conduct directed against CSI for about 2 weeks while CSI was engaged in a project at the Mills Pond Elementary School in Smithtown, New York. Although the Respondent's agents attempted to put a 15-foot tall inflated rat at the entrance of the school, the police required that the rat be set up immediately across the street from the school. A sign was attached to the rat reading "Concrete Structures." The Respondent's agents were described as "walking back and forth" across the entrance and as pacing back and forth near the rat. The record does not indicate the exact duration of this conduct. In addition, the Respondent's agents were also seen talking to pedestrians, parents, and others and distributing Laborer's Local 66/Eastern Region handbills (as reproduced in the judge's decision) warning that CSI performed shoddy work at the school.

The Respondent repeated this activity against CSI in September at a construction site at Harborview Townhouses in Roslyn, New York. The Respondent's agents unsuccessfully attempted to place a 30-foot tall rat with a "Concrete Structures" label at the turnoff to the entrance, but before they could install it, the police made them move it to a location 15–20 feet away, in the median just across from the entrance. At the Harborview site, the Respondent at first had two or three agents positioned in front of the gates, walking back and forth and distributing handbills to CSI employees and others working on the site, as well as to pedestrians and homeowners. The handbills alleged shoddy work by CSI and identified the Respondent as the author. Apparently, the Respondent's agents later relocated a short distance away. The record does not detail how long they patrolled at the entrance.

In March, CSI began performing work for The Ranches, where 186 homes were being constructed on a 33-acre site in Mt. Sinai, New York. On October 28, the Respondent inflated a 30-foot tall rat at the main entrance, on which it attached a sign reading "Concrete Structures." The credited testimony indicates that three of the Respondent's agents positioned themselves at the entrance gates, walking back and forth across the entrance, doing so whether or not cars were immediately approaching the entrance. The Respondent's agents arrived at the entrance daily[3] at about 7:30 a.m., when CSI and other contractors reported for work. The sales office did not open until 10 a.m. The Respondent's agents remained at the entrance each day for about 8 hours, walking back and forth in front of the rat and distributing handbills to passing cars, which read:

[1] To the extent that the Respondent excepted to the judge's credibility findings, we have carefully examined the record and find no basis for reversing the judge's conclusions. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

[2] All dates are 2002, unless otherwise noted.

[3] The Respondent admits that this conduct continued to November 6 and resumed on November 13 to 15.

The Ranches at Mount Sinai
BUYER BEWARE
The "old charm" of Long Lake Development[4] is not all it's *cracked* up to be!

Long Lake Development has hired Concrete Structures for concrete work on this project.
Concrete Structures has a history of poor work, such as cracking in the concrete of the Mill Pond E.S. in Smithtown after just two weeks.
If you are considering buy [sic] a house at this location call Americo Magalhaes @ (631)588-7612
Ask him for a guarantee that the concrete will not crack or crumble after two months.
Justice in Concrete
(631) 733–0756
This is directed to the public. We are not asking anyone to cease work or stop deliveries.
Labor Donated

Joseph Dauman, an employee of another contractor working at the Mt. Sinai site, testified that when he appeared for work at the jobsite the Respondent's agents "formed" at the entrance, apparently temporarily blocking his ingress. They then separated and allowed him to drive through. Dauman testified that the Respondent's agents specifically made note of his license plate and immediately placed a telephone call after he drove past.

On October 30, the Respondent's regional coordinator, Byron Silva, sent a letter to The Ranches' management alleging that CSI had committed violations of The Occupational Safety and Health Act (OSHA) and New York State prevailing wage laws. Silva's letter stated that "[i]t is our contention that Concrete Structures is not the most reputable contractor for your project. . . . We ask that this project be awarded to a contractor that is responsible." The letter stated that the Respondent had launched and would continue a very public campaign against CSI, a clear reference to the Respondent's conduct at the entrance to the Mt. Sinai jobsite.

On November 6, CSI President Magalhaes met with Silva and another union representative. Silva told Magalhaes that they wanted him to sign a union contract. Magalhaes refused, but told them that he also did work at the residential rate. Silva said that if he would pay the residential rate and call them within the week, they would remove the inflated rat. Following the meeting, the Respondent removed the rat, but then replaced it on about November 13, after Magalhaes had not called during the prior week.

On November 13, The Ranches informed Magalhaes that the contract with CSI was being terminated because the picketers had not been removed. CSI left the jobsite that day. Two days later, the remaining concrete pouring work was awarded to another contractor whose employees were represented by a union. After The Ranches sent a letter to the Respondent confirming that this was done, the inflated rat and the handbillers were removed.

II. JUDGE'S ANALYSIS

The judge found that the Respondent's conduct at the jobsites amounted to picketing. In this context, he found that the Respondent's demand that The Ranches use a "responsible" contractor was the equivalent of asking The Ranches to sever its relationship with CSI. The judge concluded that the Respondent violated Section 8(b)(4)(i) and (ii)(B) at The Ranches by engaging in this conduct. The judge also concluded that because the Respondent's picketing at The Ranches as well as at two other jobsites was for a recognitional object and exceeded 28 days over a 4-month period, during which time the Respondent did not file a petition for an election, the Respondent's actions were unreasonable within the meaning of Section 8(b)(7)(C).

III. DISCUSSION

1. Section 8(b)(4)(i)(B) prohibits the inducement and encouragement of any individual to cease working where an objective, inter alia, is forcing any other employer to recognize or bargain with a labor organization that is not the certified representative of its employees. Section 8(b)(4)(ii)(B) prohibits the coercion of a neutral employer in furtherance of such an objective.

It is clear that the Respondent's activity had a secondary objective. That is, the Respondent's activity was aimed at a neutral, The Ranches, in pursuit of a recognitional dispute with primary CSI. The Respondent's agent, Silva, repeatedly told Magalhaes that he wanted CSI to sign a union contract and, as indicated, the Respondent does not dispute this finding. Further, the Respondent's October 30 letter to The Ranches, in which it demanded that The Ranches replace CSI with a "responsible" contractor, indicates that it wanted to pressure The Ranches to cease doing business with CSI with an objective of forcing CSI to recognize the Respondent.

Having determined that the Respondent's object was secondary, the next question is whether the Respondent's activity amounted to picketing and, therefore, was 8(b)(4) conduct in furtherance of this recognitional objective. We find that it was.

[4] Long Lake Development was a contractor in a prior construction project, and was not working on The Ranches site in Mt. Sinai. Additionally, another similar handbill was distributed which omitted "The Ranches at Mount Sinai," and which listed a contact name other than Magalhaes.

Picketing may be found to occur where a small number of persons actively engage in patrolling—back and forth movement—establishing a form of barrier at the site in question. *Sheet Metal Workers Local 15 (Brandon Regional Medical Center)*, 346 NLRB No. 22 (2006).[5]

Here, only two or three of the Respondent's agents were identified as being present onsite and they carried no traditional picket signs at any of these locations. Nonetheless, under the precedent cited, no minimum number of persons is necessary to create a picket line. The issue is not how many persons participated, but rather the activities in which they were engaged. Here, the Respondent's agents patrolled the area in front of the jobsite entrances, and in so doing, they marked their territory, creating a barrier. In finding the conduct by the Respondent to constitute "patrolling," we stress that the testimony regarding each of the three worksites in this case specifically indicated that the Respondent's agents walked back and forth across the sites' entrances. The Respondent has not attempted to dispute this description, or to contend that it occurred only when a handbiller was approaching an intended recipient of a handbill. In the absence of any evidence that the movement by the Respondent's agents could reasonably be described as something other than what it appeared to be, i.e., patrolling, we find that the Respondent's agents' back and forth movements at each of these locations effectively formed a barrier at the entrance to the sites that could be viewed as a form of picketing.

The fact that the Respondent did not use picket signs is not controlling. *Jeddo Coal Co.*, 334 NLRB at 686. Moreover, one respondent agent momentarily blocked at least one employee of a neutral contractor—Joseph Dauman—from entering The Ranches' worksite. Dauman had not slowed to accept a handbill, or otherwise indicated a willingness to communicate with the Respondent's agents. When Dauman failed to heed the Respondent's agents, Dauman saw them taking note of the information on his license plate, which could be used to identify him, and then immediately communicating with someone by phone. Such intentional restraint of another person's freedom of movement, with the apparent collection of information regarding those who crossed onto the site, amounted to coercive confrontation. *Operating Engineers Local 17 (Hertz Equipment Rental)*, 335 NLRB 578, 584 (2001); *Big Horn Coal Co.*, 309 NLRB 255, 258 (1992). That coercion was unlawful under Section 8(b)(4)(ii)(B).

The Respondent's patrolling at The Ranches also constituted an unlawful inducement under Section 8(b)(4)(i)(B). In an attempt to argue the contrary, the Respondent claims that its protest was primarily directed at the public, and not at employees of contractors working onsite. However, the evidence establishes that the Respondent's agents arrived onsite each day at The Ranches location 2-1/2 hours before the sales office opened, at a time when only employees of contractors would encounter them. Thus, their activities, including patrolling and the blocking of the entrance, were plainly directed at employees of neutral companies. As noted above, the Respondent also temporarily blocked employee Dauman's entry to the jobsite, thereby inducing him not to work, in violation of Section 8(b)(4)(i)(B).

Under these circumstances, we find that the Respondent's protest activities at The Ranches constituted unlawful picketing under Section 8(b)(4)(i) and (ii)(B).[6] Having found the alleged violations on this basis, it is therefore unnecessary to consider the further implications of the Respondent's use of an inflated rat, and we do not pass on the judge's conclusion that the Respondent's deployment of the rat itself constituted signal picketing.

2. As described above, the judge also concluded that the Respondent violated Section 8(b)(7)(C) at all three jobsites by engaging in recognitional picketing for an

[5] While the picketing in this case involved patrolling, the Board has held that "neither patrolling alone nor patrolling combined with the carrying of placards are essential elements to a finding of picketing; rather the 'important' or essential feature of picketing is the posting of individuals at entrances to a place of work." *Service Employees Local 87 (Trinity Maintenance)*, 312 NLRB 715, 743 (1993), enfd. mem.103 F.3d 139 (9th Cir. 1996), citing *Laborers Local 389 (Calcon Construction Co.)*, 287 NLRB 570, 573 (1987); *Teamsters Local 282 (General Contractors Assn. of New York)*, 262 NLRB 528, 529 (1982), *Carpenters Local 2797 (Stoltze Land & Lumber Co.)*, 156 NLRB 388 (1965); see also *Mine Workers District 2 (Jeddo Coal Co.)*, 334 NLRB 677, 686 (2001). The Board has also held that other conduct, apart from patrolling with placards, can be activity that constitutes picketing or at least "restraint or coercion" within the meaning of Sec. 8(b)(4)(ii)(B). See, e.g., *Brandon Regional Medical Center*, supra, 346 NLRB No. 22, slip op. at 2.

Member Liebman, for the reasons expressed in her concurrence in *Brandon Regional Medical Center*, 346 NLRB No. 22, slip op at 2, emphasizes that picketing is differentiated from handbilling or other forms of mere persuasion by its association with some form of conduct that effectively creates a physical or symbolic barrier. In her view, picketing is defined not by the mere presence of individuals, but by conduct that results in a coercive confrontation. See *Chicago Typographical Union No 16* (*Alden Press*), 151 NLRB 1666, 1669 (1965)("The Board has held that not all patrolling constitutes picketing in the statutory meaning of that term . . . . 'One of the necessary conditions of 'picketing' is a confrontation in some form . . . .").

[6] We find it unnecessary to rely on the judge's discussion of the Respondent's conduct in relation to The Ranches' implementation of a reserve gate system at the Mt. Sinai site. Our finding that the Respondent engaged in prohibited conduct is supported by the Respondent's initial picketing at this site, which occurred prior to the creation of the reserve gate system and by Silva's October 30 letter to The Ranches stating a proscribed cease-doing-business objective with respect to this neutral employer.

unreasonable period of time in the absence of an election petition. We have applied Section 8(b)(7)(C) to bar recognitional picketing exceeding thirty consecutive days, relying on the clear statutory language. *Retail Wholesale Union District 65 (Eastern Camera & Photo Corp.)*, 141 NLRB 991, 999 (1963). However, the Board has held that recognitional picketing for fewer than 30-consecutive days may also be unlawful, where the picketing, albeit intermittent, spans a period longer than 30 days. *Electric Workers Local 265 (RP & M Electric)*, 236 NLRB 1333 (1978), enfd. 604 F.2d 1091 (8th Cir. 1979).[7] In this case, the judge found that the Respondent's recognitional picketing intermittently conducted at the three separate jobsites over a period covering 4 months was unreasonable, even though the picketing occurred on only 28 specific days during that period. Under the precedent, we agree that the duration of the Respondent's picketing was unreasonable within the meaning of Section 8(b)(7)(C).

[7] See also *Operating Engineers Local 4 (Seaward Construction Co.)*, 193 NLRB 632 (1971), and *Butchers' Union Local 120 (M. Moniz Portugese Sausage Factory)*, 160 NLRB 1465, 1469 (1966).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Laborers' Eastern Region Organizing Fund, its officers, agents, and representatives, shall take the actions set forth in the Order.

Dated, Washington, D.C. April 28, 2006

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD